IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

Case No. 81-6891

LESLIE R. JONES,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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RESPONSE TO THE PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA AND THE UNITED STATES SUPREME COURT

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PRELIMINARY STATEMENT

Any record references shall be to Petitioner's Petition, labeled by the appropriate letter of his appendix, followed by the appropriate page number.

OPINION BELOW

Petitioner seeks review by this Court of his death sentence, imposed by the trial court, and reviewed by the Florida Supreme Court in Jones v. State, 411 So.2d 165 (Fla. 1982).

JURISDICTION

Petitioner improvidently seeks to invoke this Court's jurisdiction pursuant to Title 28, U.S.C., Section 1257(3). The issues raised by Petitioner should not be reviewed by this Court. Review by writ of certiorari is a matter of sound judicial discretion, and will be granted only where there are special and important reasons therefor. Ross v. Moffitt, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974).

QUESTION PRESENTED

WHETHER IMPOSITION OF PETITIONER'S DEATH SENTENCE WAS UNCONSTITUTIONAL BECAUSE ADDITIONAL AGGRAVATING FACTORS WERE FOUND IN PETITIONER'S RETRIAL THAT WERE NOT FOUND IN PETITIONER'S ORIGINAL TRIAL.

STATEMENT OF THE CASE AND FACTS

Petitioner's Statement of the Case and Facts is accepted.

REASONS FOR NOT GRANTING THIS WRIT

At Petitioner's first trial, he was found guilty of first degree murder, the death sentence was recommended by the jury, and the trial court, finding three aggravating circumstances and no mitigating circumstances, sentenced him to death. Jones v. State, 362 So.2d 1334 (Fla. 1978) and appendix "D". Petitioner's first conviction was reversed for procedural reasons and he was retried, found guilty of first degree murder, with the jury once again recommending the sentence of death and the court imposing it, finding five aggravating circumstances and no mitigating circumstances. Jones v. State, 411 So.2d 165 (Fla. 1982).

Petitioner alleges that, on the authority of Bullington v. Missouri, ___ U.S. ___, 101 S.Ct. ___, 68 L.Ed.2d 270 (1982) and Bullard v. Estelle, 665 F.2d 1347 (5th Cir. 1982), review granted 31 Criminal Law Reporter 4086, Case No. 81-1774,* the State should not have been allowed to prove aggravating circumstances in Petitioner's retrial that were not proven at his first trial.

In Bullington, this Court prohibited the State of Missouri from seeking the death penalty in Bullington's retrial after he had been sentenced to life imprisonment in his initial trial.

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* Petitioner relies upon Bullard v. Estelle in his Supplemental Brief on Petition for Writ of Certiorari to the Supreme Court of Florida, dated June 30, 1982.

Here, Petitioner received the death penalty in his original trial as well as his second trial. More about this later.

In Bullard v. Estelle, Bullard received two sentencing proceedings after the Texas court of criminal appeals found the evidence insufficient at the first to support the imposition of an enhanced "life imprisonment sentence" to which habitual offenders may be subjected. At the second sentencing proceeding, the State of Texas apparently repaired the identification deficiency which existed at the first proceeding and Bullard's sentence was increased to life.

Bullington's and Bullard's resentencings have a common element: both resulted in the increase in the quantum of punishment over their original sentences.

Jones' resentencing is distinguishable from Bullard's and Bullington's because whereas the latter's quantum of punishment was increased, Jones' remained the same: Jones received a jury recommendation of death at both his first and second trials, and the trial court imposed it.

In Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977), this Court held that the changes in Florida's death sentencing procedure did not deprive the defendant of a substantial right in violation of the ex post facto clause of the Constitution because such changes were mere procedural changes, not affecting the quantum of punishment. Under the reasoning of Dobbert v. Florida, the trial court did not find additional factors which were prohibited by the rule in North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2972, 23 L.Ed.2d 656 (1969) or Bullington v. Missouri, because the quantum of punishment remained the same in Jones' first and second trials.

Under Florida law, even if this Court concludes that under the rationale of Bullington v. Missouri that the trial court improperly found the two additional aggravating circumstances that

were not found in Petitioner's initial trial, the error is harmless as no mitigating circumstances were found either in Petitioner's first or second trial. See Elledge v. State, 346 So.2d 998 (Fla. 1977), Aldridge v. State, 351 So.2d 943 (Fla. 1977), Douglas v. State, 373 So.2d 895 (Fla. 1979) and Brown v. State, 381 So.2d 690 (Fla. 1980). Under the very principles of collateral estoppel upon which Petitioner relies, Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 27 L.Ed.2d 469 (1970), this Court can be as sure as death and taxes that the additional aggravating circumstances found in Petitioner's second retrial did not increase the quantum of punishment. In Petitioner's first trial, where only three of the aggravating circumstances were found, the jury recommended death and the judge imposed it. There is no reason to believe, and every reason to believe to the contrary, that a third jury would recommend life and that another judge would be forced to impose it, because of the overwhelming evidence of Petitioner's guilt and the first jury and judge's factual resolution that death is the appropriate sentence.

Petitioner also relies upon State v. Silhan, 275 S.E.2d 450, 482 (N.C. 1981) and Zant v. Redd, 290 S.E.2d 36 (Ga. 1982), for the proposition that two courts in two different states have reached a contrary conclusion concerning the applicability of the double jeopardy clause where additional aggravating circumstances are found at resentencing. First, both Georgia and North Carolina, unlike Florida, make the recommendation of the jury as to sentence binding upon the court. Second, whatever the merits of the underlying issue regarding the applicability of the double jeopardy clause to such a situation, this case does not present the proper factual circumstances in order to resolve this alleged conflict because it can be said with certainty that the additional aggravating circumstances found in the second trial did not increase the quantum of punishment imposed in the first trial.

CONCLUSION

Based on the foregoing arguments and authorities, this Court should decline to exercise its discretionary jurisdiction because (1) the quantum of punishment was not increased from Petitioner's first trial to his second, and (2) even if this Court were to strike the additional aggravating circumstances, the result in another resentencing would be no different than the first two.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Mr. Steven L. Bolotin, Assistant Public Defender, Post Office Box 671, Tallahassee, FL 32302 by Hand Delivery this 2nd day of July, 1982.

David P. Gauldin
DAVID P. GAULDIN